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Supreme Court of the United States

OCTOBER TERM 1968

DARLINGTON MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION OF DARLINGTON MANUFACTURING COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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November 8, 1968

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Petitioner, Darlington Manufacturing Company (hereinafter "Darlington"), petitions the Court for a writ of certiorari to review a decree of the United States Court of Appeals for the Fourth Circuit upholding a decision by the National Labor Relations Board (hereinafter "the Board") that Darlington, in liquidating its only plant and terminating permanently its corporate existence, violated section 8(a)(3) of the National Labor Relations Act.

Opinions Below

The majority and minority opinions of the Court of Appeals are reported at 397 F. 2d 760 and appear at the beginning of the Appendix accompanying this petition.[1]

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[1] The Appendix is a joint Appendix accompanying both this petition and the separate petition of Deering Milliken, Inc., seeking review of the same judgment.

The decision and order of the Board (165 NLRB No. 100) appear in the Appendix beginning at page 41a. This Court's previous opinion in this case is reported at 380 U.S. 263. The Court of Appeals' earlier opinion previously vacated by this Court is reported at 325 F. 2d 682. The Board's first decision and order are reported at 139 NLRB 241.

Jurisdiction

The decree of the Court of Appeals was entered on May 31, 1968. A timely petition for rehearing was denied by that court on August 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented [2]

1. Whether the Board properly applied the rule of law previously laid down by the Court in this case by holding that a company faced with substantial losses violated section 8(a)(3) of the National Labor Relations Act by liquidating its only plant and permanently terminating its own corporate existence, merely on the basis of a finding that the motive of a single officer and director, owning less than five per cent of the corporation's stock, in proposing liquidation of the business was, in part, to chill unionism in other plants, with no finding that his motive was communicated to the other directors and stockholders or that he dominated or controlled their decision.

2. Whether the Court of Appeals may sustain the Board's order on the basis of findings not made by the Board.

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[2] To avoid unduly lengthening these petitions Darlington does not reiterate points urged by Deering Milliken in its separate petition. However, since the points urged by Deering Milliken require reversal of the Board's order as to both respondents, Darlington relies upon and incorporates by reference the arguments made by Deering Milliken.

Statute Involved

The questions discussed in this petition involve application of section 8(a)(3) of the National Labor Relations Act, printed at App. 85a.[3]

Statement of the Case

For the past twelve years Darlington has been a respondent before the Board in this proceeding. The Board has twice upheld a claim by the Textile Workers Union that following its election as bargaining agent for Darlington employees Darlington violated section 8(a)(3) of the National Labor Relations Act by ceasing to conduct an unprofitable business and terminating its corporate existence.

Facts Giving Rise to the Controversy

Darlington was chartered by the laws of South Carolina in 1883. (R. 479.) It operated a single cotton mill in Darlington, South Carolina, which was built about 1888. It had no other plant or physical assets. (See R. 391.) As a result of Darlington's bankruptcy in 1937, about 41 per cent of its common stock passed to Deering Milliken, Inc., which had been a major creditor. (R. 391.)[4] By the 1950's Darlington was again in serious difficulties. The

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[3] Unless otherwise noted, record citations herein ("R.") are to the Joint Appendix printed in the Court of Appeals and included as part of the record in this case. "App." refers to the Appendix accompanying this petition.

[4] By 1956 a majority of Deering Milliken's stock was, in turn, owned by members of "the Milliken family," a group defined as "the lineal descendants of Seth Milliken." (App. 46a.) The same was true in 1956 of Cotwool Manufacturing Co., which then owned 18.3 per cent of Darlington's stock. Individual members of the Milliken family owned only 6.4 per cent of Darlington's stock directly. Deering Milliken owned 41.4 per cent. The remaining 33.9 per cent was owned by more than 200 non-Milliken shareholders scattered throughout the United States and abroad. R. 1310.

principal causes were declining textile prices, resulting from the introduction of more efficient equipment by United States manufacturers and the importation of low-cost foreign textile products, and shifting patterns of textile consumption in the United States away from the kinds of textiles Darlington's obsolescent equipment was designed to produce. (R. 53, 411-421, 444, 461-464.)

In 1952 Darlington began a program of capital improvement. (R. 444, 1283-85.) Darlington's ancient building made the introduction of new methods and equipment difficult and exceedingly costly. (See R. 58.) Competitive mills were able to proceed toward modernization more rapidly and cheaply. (R. 404, 407-09, 2758.) Between 1952 and 1956, Darlington's cost per unit produced remained unacceptably high, while its average return on invested capital (2.8 per cent) was less than half that for the industry as a whole. (See App. 47a; R. 392, 400, 404, 2164, 2183-85.)

In 1955 a study by Barnes Textile Associates, Inc., textile engineering consultants, confirmed that structural deficiencies in the plant building were the cause of Darlington's inability to bring costs into line with those of competitive mills. (R. 400-01.) The consultants' report recommended that an investment of approximately 1.2 million dollars be made in structurally improving and air conditioning Darlington's plant. (R. 399, 2166, 2171, 2759.)

Darlington's seven-member board of directors met in January of 1956 to consider these recommendations. The directors rejected them because, in their view, neither present nor anticipated future economic performance at Darlington justified an investment of that magnitude in unsalvageable structural modifications of the fundamentally unsound plant building. (R. 400, 416, 461.) Instead, the Darlington board determined upon a compromise under

which a smaller investment would be made in the renovation and purchase of equipment. The equipment could be removed if it proved unsuccessful to operate the mill competitively. Darlington's directors then believed that Darlington's economic prospects "did not justify making an investment that was permanent in nature, one that once made could not be taken out." (R. 399.) As Chief Judge Haynsworth recognized, "everything in this record points to the conclusion that Darlington's days were numbered." (App. 34a.)

In March 1956, two months after this meeting, the Textile Workers Union began an election campaign at Darlington. The campaign was based primarily on the union's promise that it would prevent Darlington from carrying out the changes in work assignments and procedures which had attended the installation of new equipment in accordance with decisions made by the Darlington board in January. (R. 422-23, 457, 469, 472, 1275-80.) The union won a narrow victory in an election held on September 6, 1956.

The Darlington board again met on September 12, 1956, to consider liquidation of the corporation. (R. 279-80.) This meeting was called by Roger Milliken, who was one of Darlington's seven directors. He owned about 4.7 per cent of its stock. (R. 388.) He held the title of President, and as such presided at the directors meetings; but Darlington's chief executive officer was its Treasurer, James Oeland. (See R. 120, 268-69, 561, 583, 1134.)

Roger Milliken testified that he believed the union's election warranted another review by Darlington's directors of "all of the economic factors affecting the company and the prospects of profitable operations in the future." (R. 475.) The union's victory was concededly a factor that, in Roger Milliken's view, was relevant to the question of liquidation. The Darlington board had concluded in Jan-

uary that labor costs had to be cut through the introduction of new equipment if there were to be any possibility of reducing costs to the point where the plant could continue in business. (R. 402-03, 422-24.) Yet the union had promised Darlington employees that it would oppose such changes. (R. 402-03, 422-24, 457, 469.)

In addition, the economic prognosis at Darlington had, by September, worsened in almost every respect. Textile prices had steadily declined from January levels. (R. 60, 418-21.) Costs had not improved, despite an investment of about $400,000 in the first nine months of that year in equipment improvements designed to cut labor costs. And a general wage increase was imminent. (R. 469-470, 1274.) At mid-year Darlington's Treasurer had estimated that the results for the fiscal year ending December 2 would show a loss of $40,000 (R. 61, 427, 443, 2757), and a loss of nearly a quarter of a million dollars was projected for fiscal 1957. (R. 441-42, 463, 476, 2695, 2757.) The Board recognized these facts. (App. 47a-48a.)

The loss projected for the then-current fiscal year was a substantial one, almost one-third of the preceding year's profit. The loss projected for fiscal 1957 was staggering—approximately double the greatest profit Darlington had made in any one of the previous five years, save one. (See R. 441-42.)

Darlington's seven directors, on September 12, 1956, unanimously recommended that the corporation be liquidated. (R. 2696.) A stockholders' meeting was duly called for October 17, 1956, and proxies were solicited authorizing the holder, without discretion, to vote the proxy as marked, for or against liquidation. (See R. 2699, 2761-62.) The recommendation to liquidate was carried by the vote of 134,911 shares for liquidation (97 per cent) to 3,774 shares against. (R. 1265.) Each of Darlington's seven directors,

and every stockholder called to testify, testified that in voting for liquidation he exercised his own independent judgment, based upon his assessment of Darlington's economic future; and each categorically denied that in casting his vote for liquidation he gave any consideration whatsoever to any possible effect that the liquidation of Darlington might have at any other mill.[5] This testimony, the Board concedes, "stands uncontradicted in the record" (App. 68a) as to every director and shareholder except Roger Milliken.

Prior Proceedings

The Board's first report and order, rendered October 13, 1962, recognized Darlington's serious economic problems over an extended period. Yet the Board's decision was that because the liquidation decision was, in the Board's view, prompted in part by the union's election, it violated section 8(a)(3)—whether or not "genuine economic factors" were also "responsible for the closing of the mill . . ."—and whether or not the advent of the union was itself genuinely regarded by Darlington, as Darlington had urged, as simply one of a number of objective factors impinging upon the company's prospects for profitable operations in the future. 139 NLRB at 245-246.

The Board thus took the position that an employer can never lawfully regard a union campaign and attendant promises as an "economic factor," even in a decision permanently and completely to liquidate an unprofitable business. Nowhere in its 1962 report and order did the Board suggest that the decision to liquidate Darlington was intended to have an effect on union activity elsewhere than at Darlington.

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[5] R. 2696-99, 2729-30, 2740-41, 2745-50, 2755-61, 2763, 2773, 2783, 3100-02, 3106, 3108, 3112, 3165-66, 3170-71, 3177-78, 3182, 3314-16, 3351-52, 3361, 3363-64, 3414-16, 3424, 3452-54, 3469, 3414-16, 3424.

The Board held that liability could be imposed on Deering Milliken as well as on Darlington on the theory that the various corporations with Milliken family majority ownership constituted a "single employer."

The Court of Appeals denied enforcement. Its decision, rendered November 15, 1963, stressed that the Darlington liquidation was "an actual, unfeigned and permanent end of operations . . ."; that "the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable." 325 F. 2d at 685-686. The court reasoned that the statute does not "command an employer to stay in business . . ." (*id.* at 687) or "compel one to become or remain an employer" (*id.* at 685), and suggested that any other construction of the statute would render it "of doubtful validity." *Ibid.*

This Court's decision, rendered March 29, 1965, remanded the case for further proceedings. The Court agreed with the Court of Appeals that an employer may permanently close its entire business for any reason, but did not agree that a "partial closing," even though permanent, could *never* be unlawful. 380 U.S. at 274. Writing "in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family . . .," this Court ruled:

> "If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its em-

> ployees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out." 380 U.S. at 275-276.

The Court held that there was a "fatal defect" in the Board's decision in that its "findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees." 380 U.S. at 276. (Emphasis by the Court.)

This Court stressed that a decision to permanently close down one's business, whether in whole or in part, "trenches . . . closely upon otherwise legitimate employer prerogatives. . . ." *Id.* at 276. For this reason the opinion specifically cautioned the Board: "[I]t does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in . . . other plants" owned by the single-employer entity hypothesized by the Board. *Ibid.* The opinion thus makes it clear that "legitimate employer prerogatives" were inextricably involved in the challenged act, and that liability was not lightly to be inferred by the Board in the absence of affirmative evidence establishing the factors of "purpose" and "effect" described in the opinion—"vital requisites," the Court emphasized, "of the general principles that govern a case of this kind." *Ibid.*

Proceedings on Remand

The case was remanded to the Board for a determination whether these "vital requisites" existed in this case.

Pursuant to this remand, hearings were held before examiner Buchanan, who had conducted all the previous hearings in the case. On August 10, 1966, the examiner issued a decision (R. 1920-2075) finding, after a careful and ex-

haustive analysis of the record, (1) that the persons exercising control over Darlington did not act to close that mill in order to discourage unionism at other plants in which the Millikin family owned interests, and (2) that the evidence adduced did not indicate that it was realistically foreseeable that employees at other plants would fear that their place of employment would be closed down if they persisted in organizational activities or that such employees were in fact led so to fear.

On June 27, 1967, the Board brushed aside the findings and recommendations of the examiner and again held that the decision to liquidate Darlington violated section 8(a)(3). The Board based its decision on a finding that Roger Milliken had the unlawful purpose required by this Court, but did not dispute the testimony of each other participant in the decision to liquidate that he exercised his own independent judgment and had not considered the impact of the closing on unionism elsewhere. (App. 68a-71a.) There was no finding, and no evidence, that any other director or shareholder of Darlington (1) shared Roger Milliken's prohibited motive, (2) knew of that motive, or (3) was dominated or controlled by Roger Milliken in reaching his decision.

The Court of Appeals, on May 31, 1968, upheld the Board on the assumption that the Board had based its decision on evidence and findings that Roger Milliken exercised control or domination over other Darlington directors.[6] In addition, the Court of Appeals offered as an alternative basis for upholding the Board a finding, not made by the Board, that Roger Milliken controlled the vote of a majority of the Darlington stock for liquidation. (App. 23a.) Judges Bryan and Boreman dissented on the

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[6] The jurisdiction of the Court of Appeals to review the Board's decision was conferred by 29 U.S.C. § 160(f).

ground that the Board had failed properly to apply the rule laid down in this Court's decision, particularly because the Board ignored the motives of all the directors and shareholders other than Roger Milliken. (App. 37a.) Chief Judge Haynsworth filed a separate concurring opinion expressing "misgivings" about the decision. (App. 33a.) On September 11, 1968, Chief Judge Haynsworth entered an order staying the court's mandate conditioned upon the filing of petitions for certiorari in this Court within sixty days.

Reasons for Granting the Writ

The Board's decision cannot be reconciled with the principles laid down, for the guidance of lower courts and the Board, by this Court in its prior opinion. This case, as the Court recognized, was the first to place in issue the lawfulness of a partial closing of a business allegedly motivated by a purpose to chill unionism elsewhere. Pointing out that this is an area which "trenches . . . closely upon otherwise legitimate employer prerogatives . . .," the Court carefully formulated a rule intended to serve as a line of demarcation between those prerogatives and the right of employees to bargain collectively.

The Board has misunderstood and misapplied the demarcation line fashioned by the Court, and has done so in a way that, if not corrected, will seriously disturb the proper balance between the important interests involved. This Court held that a plant closing is unlawful if and only if "the persons exercising control over" the closing act for the purpose of chilling unionism in other businesses in which they have an interest. The Board has held that the Court's test is satisfied if a single director-shareholder secretly harbors the proscribed purpose, even though his vote was not essential to the closing of the plant and even

though he did not dictate or control the vote of the other directors and shareholders, who are shown by uncontradicted evidence to have voted to liquidate for reasons unrelated to any purpose to chill unionism in other plants.

The findings on which the Board based its decision fall far short of those required to satisfy the standard that this Court laid down. The Board's misapplication of that standard, if allowed to stand as a precedent, will have wide consequences, for the United States textile industry, and for other industries similarly faced with new competitive pressures that make existing production procedures and facilities uneconomical.[7] The authority to liquidate one of a group of plants because its continued operation will result in substantial losses is a prerogative of corporate management that is frequently exercised. It is a prerogative of substantial importance in any economy that depends primarily upon private initiative for the efficient allocation of effort and resources. The Board decision would substantially impair this prerogative. The decision assumes that a majority of those controlling a corporate business may not lawfully exercise the prerogative, even though their motives are lawful, if there is evidence that a single member of management was prompted by an undisclosed and unlawful purpose. Any such rule of decision is inconsistent with the careful balance of competing interests that this Court attempted to achieve in its earlier decision.

The Court of Appeals sustained the Board's result on the basis of findings which the Board did not make and which the evidence would not have supported. In so doing

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[7] The record in this case shows that economic change has required widespread adjustment throughout the textile industry, with attendant liquidation of existing plant facilities at a rate which by 1956 exceeded one hundred plants a year. R. 416-17.

the Court of Appeals violated principles that are essential to the orderly process of judicial review of administrative action. Its decision is in direct conflict with the decision of this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, and supplies a distinct and compelling reason for review by this Court.

Because the Court of Appeals and the Board have sought to hold Darlington's liquidation unlawful on different grounds, we shall consider first whether the Board's order can be sustained on its own terms, and second, whether the Court of Appeals erred in attempting to sustain the Board on the basis of assumed findings that the Board in fact did not make.

1. *The Board's Finding of Unlawful Intent on the Part of Roger Milliken Alone Does Not Satisfy the Requirement of This Court That the Chilling Purpose Must Have Been Shared by "the Persons Exercising Control Over" the Plant Closing.*

The decision to liquidate Darlington was made by its seven directors unanimously, and by its shareholders by a 97 per cent vote. Each of these decisions was made by vote at a meeting after full discussion of the factors weighing both for and against closing the plant. Directors and shareholders who had no interest in any other Deering Milliken mill, and who thus could not possibly have had the prohibited motive, participated and concurred in the decision to liquidate.

At the remand hearing all seven Darlington directors testified extensively, on direct and cross, as to their purposes and motives in recommending liquidation. (R. 2695-97, 2740-41, 2760-61, 3100-01, 3363-64, 3414-16, 3424, 3452.) As these directors were also stockholders, many of them also testified concerning those same matters in relation

to the stockholders' meeting where the directors' recommendation was adopted. (R. 2699, 2763, 3102, 3315-16, 3454.) In addition, other Darlington stockholders, including the largest individual stockholder (holding about 13 per cent, R. 1214), also testified. (R. 3101-02, 3163-66, 3170, 3178.)

The boards of directors of Deering Milliken, Inc., and of Cotwool Manufacturing Corporation, the two largest shareholders of Darlington, also met and determined to vote the Darlington stock held by their corporations in favor of liquidation. (R. 2699, 2742, 2761-62, 3362-63.) Four of the twelve participants in these two directors' meetings testified.

Each participant in these decisions testified emphatically that he did not vote to close the Darlington plant because of any effect the closing might have upon union activity elsewhere; each denied that the possibility that the Darlington closing would have an effect upon employee organizational activity at any other plant had been discussed or considered. Each testified that in voting as a director or stockholder he exercised his own independent judgment, based on the economic situation at Darlington. Several participants testified that they considered the impact of the union's election *at Darlington* upon the company's efforts *there* to bring costs into line with other mills.[8]

The Board does not question any of this testimony on the part of any of the participants except Roger Milliken.

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[8] R. 2695-99, 2729-30, 2737-42, 2745-50, 2755-61, 2763, 2773, 2783, 3100-02, 3106, 3112, 3165-66, 3170-71, 3177-78, 3182, 3314-16, 3351-52, 3361-64, 3414-16, 3424, 3452-54, 3469. Much of this testimony was given prior to the time this Court laid down its "chilling purpose" test in the present case and before anyone could have known that such a test was part of our law. R. 7-9, 55, 57-66, 291-92, 422-31.

The Board simply disregards it and announces that, in its view, "the critical purpose is the one which moved Roger Milliken." (App. 68a.)

In holding the decision to liquidate Darlington unlawful because of the alleged motive of Roger Milliken alone, the Board fails to satisfy the explicit test laid down by this Court. The crucial language of this Court's decision required the Board to find that "the persons exercising control over" Darlington acted "to close their plant" for the specific purpose of deterring unionism at other plants in which they had a substantial interest. Roger Milliken alone did not exercise control over the closing of Darlington and the Board does not find that he did. Nor does the Board find that the other Darlington directors and shareholders, who with Roger Milliken shared control over Darlington, were subject to Roger Milliken's dictation, direction or control. Indeed, the Board makes no finding that any other director or shareholder of Darlington even *knew* that Roger Milliken had the prohibited motive.

The Board's own language betrays its concession that Roger Milliken was by no means the sole "person exercising control over" the Darlington closing. The Board speaks of "Roger Milliken and the Milliken family" as "those in control of Darlington" (App. 51a), and elsewhere defines "the persons exercising control over" Darlington as "the Milliken family, as advised and influenced by Roger Milliken." (App. 52a.) More specifically, the Board recognizes that the votes of four Milliken family directors, of whom Roger was but one, were "the only votes necessary to carry the resolution" of liquidation. (App. 69a.) The Board's ultimate finding was that "those exercising control over Darlington, especially in the person of Roger Milliken," had the prohibited purpose. (App. 84a.) This ultimate

finding is not supported by specific findings of fact, and is expressly contradicted by the Board's concession that there is no evidence in the record to impeach the testimony of each other director-shareholder, including that of each other Milliken family director of Darlington, that he did not act with the intent to chill union activity in other plants.[9]

Since the Board recognizes that other persons besides Roger Milliken were in the group "exercising control over" the closing, and since everywhere but in its ultimate conclusory finding the Board concedes that there is no basis in the record to justify a finding that any other member of the group acted with the proscribed purpose (App. 68a), the Board was faced with a failure of proof that had to be bridged somehow if liability was to be imposed. The only logical way this gap could be bridged was by a finding that Roger Milliken dictated or controlled the decision of the other directors, so that his purpose alone was the operative or effective purpose. But this finding the Board did not and could not make; the record is as devoid of any hint of such dictation or control as it is of evidence that other directors or shareholders harbored the proscribed intent themselves. Indeed, the record flatly negatives any such dictation or control through a wealth of unchallenged evidence to the contrary, which, again, the Board does not challenge or reject. (R. 424-31, 2696, 2699, 2740-41, 2760-61, 2763, 2773, 3102, 3166, 3314-15, 3452.)

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[9] Probably the most revealing and critical language in the Board's opinion is this (App. 68a): "We are aware of the testimony by the members of the board of directors and stockholders (including Roger Milliken) that they did not intend, by the votes they cast, to chill unionism elsewhere, and that such a prospect was not discussed at the two meetings. While the Trial Examiner did not expressly find this testimony credible, neither did he discredit it, and it stands uncontradicted in the record. But we find it of little moment that there was such testimony from the other directors for we believe that the critical purpose is the one which moved Roger Milliken."

The Board attempted to bridge the gap in the evidence by finding that Roger Milliken "advised and influenced" the other directors and then concluding that this in some way was enough to make his purpose determinative and theirs irrelevant, *even though* they concededly voted independently and for their own reasons, and *even though* if Roger Milliken held a chilling purpose he carefully concealed it from the others. The Board's reasoning is inconsistent with the standard laid down by this Court in its prior opinion. That standard was stated in terms of *control* not *advice* or *influence*. *Cf. Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 501. If a person was one of those who controlled the Darlington closing—and by the Board's own admission at least the four Milliken family directors were in this group—then his purpose is relevant unless he himself was controlled by another.

The Board's findings do not face the issues squarely. The findings contain a number of statements with respect to the position of Roger Milliken but there is no direct unequivocal finding that Roger Milliken dominated or controlled the other directors or that he communicated his alleged unlawful intent to them. Instead the Board speaks of Roger Milliken as "the chief figure in the family hierarchy" (App. 46a); the "appointed steward of the Milliken family interests." (App. 47a.) "He held the obvious position of power in the corporate organization, he convened the meeting, he offered the resolution, and he advised why the resolution should be accepted." (App. 68a.) From this the Board concludes that "Roger Milliken's denial of illicit purpose is the one which must survive the weight of the other evidence. . . ." (App. 70a-71a.)

The conclusion is a complete *non sequitur* and distorts the standard this Court formulated. Roger Milliken could, as he did, make recommendations to the other Darlington

directors; but whether they accepted them or not was a matter for their own decision in the exercise of their fiduciary duty to all the shareholders, Milliken and non-Milliken. The Board does not challenge the testimony of each participant in the crucial decision to liquidate Darlington that he exercised his own independent judgment in voting for liquidation. Thus, Roger Milliken may or may not have been the family's "chief figure" or "steward" in other, more routine undertakings, in the day-to-day management of many of the family investments; but in liquidating Darlington each Milliken director participated deliberately and independently; each acted for his "own reasons," about which every director testified at length (*e.g.*, R. 2747-50); and each emphatically denied that he was "taking orders from anybody." (*E.g.*, R. 2699.) There is no evidence and no finding to the contrary.

The Board makes no findings that the other directors and shareholders habitually *followed* advice they received from Roger Milliken, or that they had no other sources of advice and influence, including one another. Indeed, at the Darlington directors' meeting which voted for liquidation several other directors, including non-Milliken directors, also "advised" why they thought the plant should be closed. (R. 2694-95, 2739, 2757-59, 3100.) And the Board does not find that their advice was without influence.

Whatever the Board means by "advised and influenced," it cannot mean either that the vote of any other Milliken director was dictated or controlled by Roger Milliken or that any other Milliken director or shareholder believed that the purpose of liquidation was to deter unionism at any other plant. The "advice" that Roger Milliken gave was that it seemed hopeless to expect that Darlington could become profitable and it should therefore be liquidated. (R. 2692, 2738, 2773-74, 3106, 3108, 3314, 3462-63.) If he

had a chilling purpose, he kept it completely to himself. There is no finding that he "advised and influenced" any other participant in the liquidation decision, director or shareholder, Milliken or non-Milliken, to close the plant as a deterrent to unionism at other mills. Hence the Board's decision cannot be sustained on a theory that Roger Milliken's fellow directors somehow accepted or ratified his chilling purpose by acting with him, knowing that he was acting for that purpose.

The Board seeks support for its result in the fact that Roger Milliken "voted a majority of the stock in Darlington in favor of liquidating the plant." (App. 23a.) It is true that Roger Milliken voted shares other than his own, as one of two persons named as proxies by Darlington's shareholders. But as proxy Roger Milliken had no discretion whatever; the fact that he rather than some other person was named as proxy is without legal or practical significance. The controlling purposes were those of the persons who authorized that their shares be voted for liquidation. In the case of the shares owned by Deering Milliken, Inc. and Cotwool Manufacturing Company, which together comprised over 50 per cent of the stock of Darlington, the record shows that the directors of these corporations instructed the proxy-holders to vote the Darlington stock in favor of liquidation. (R. 2699, 2761-62.)

2. *The Court of Appeals' Decision Assumes Findings Which the Board Did Not and Could Not Make.*

The Board's order must stand or fall on its own terms. The Court of Appeals, in attempting to sustain the Board's result on the basis of findings which the Board did not and could not make, has committed a clear violation of the principles laid down by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, and consistently reaffirmed in subse-

quent decisions. *E.g., NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444; *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270. These principles are at the very heart of the orderly process of judicial review of administrative action. The Court of Appeals' violation of them in this case is itself a compelling reason for review by this Court.

The Court of Appeals deals with the problems raised by the Board's exclusive reliance upon the alleged motive of Roger Milliken in a single paragraph of its opinion. (App. 23a.) In that paragraph the court notes the Board's finding that "Milliken interests controlled Darlington," and seems either to assume or to supply two additional findings which the Board did not make. These are: (1) a finding that Roger Milliken, who according to the court "occupied a dominant role in the management and control of these interests," controlled other Darlington directors in the decision to liquidate the mill; and (2) a finding that the controlling "Milliken interests" in any event "ultimately liquidated the corporation" by voting "a majority of the stock for liquidation," the court implying here that the Board had based its decision upon an alternative theory that Roger Milliken controlled the Darlington stock, even if he did not control the Darlington board, or that a majority of the stockholders who voted for liquidation shared his allegedly unlawful purpose.

The suggested finding that Roger Milliken somehow dominated or controlled the other directors in their decision to vote to liquidate Darlington is one which, as we have seen, the Board was simply unwilling to make on the record before it. No such finding could be supported by the record, as the Board was plainly well aware.

The court observed that "the Board did not have to shut its eyes to the fact that corporate directors are

frequently responsive to interests that control the majority of a corporation's stock." But the Board did not and could not find that any director was "responsive" to Roger Milliken in the sense that his exercise of his own independent judgment was dictated or controlled. Moreover, this comment of the court ignores the fact—never controverted by the Board—that the other members of the Milliken family who sat on Darlington's board represented the majority "interests" just as much as Roger Milliken did.

In offering as an alternative ground for decision the fact that "it was the stockholders who ultimately liquidated the corporation," the court departs even more sharply from the findings and theory advanced by the Board. General Counsel never attempted at the remand hearings to establish the "purpose" element of this Court's test by treating as the decisive act of liquidation the stockholders' ratification of the directors' decision to initiate liquidation. The Board made no specific finding that any stockholder shared Roger Milliken's allegedly unlawful purpose and never suggested as an alternative ground for decision that the persons who controlled the Darlington stock, and authorized it to be voted for liquidation, did so with the purpose required by this Court's decision. In fact the only evidence of record bearing on the stockholders' purpose in voting for liquidation shows that the stockholders exercised an independent judgment and that a majority of the stock was voted for liquidation for reasons which the Board does not and cannot question.[10]

In *Chenery* it was made clear that, even where the re-

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[10] R. 2699, 2763, 3102, 3165-66, 3178, 3454. General Counsel sought to exclude stockholder testimony with the concession: "We don't profess that a single stockholder who went along with a recommendation of dissolution had a motive to discourage organization throughout the Milliken mills in the entire area." R. 3178.

viewing court attempts to ground its decision upon "findings" or "considerations" which "might have been made" or "disclosed" by the agency, it cannot do so, if these were not the grounds upon which the agency itself based its action. 318 U.S. at 87-88, 90. In this case the Court of Appeals' violation of *Chenery* principles is far more serious, since the court has based its decision upon supplied or assumed findings which the Board not only did not make but clearly recognized it could not make.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 8, 1968